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No. 272

In the Supreme Court of the United States

OCTOBER TERM, 1925

ANDREW W. MELLON, DIRECTOR GENERAL AND AGENT (SUBSTITUTED IN PLACE OF JAMES C. DAVIS), APPELLANT-PETITIONER

v.

MICHIGAN TRUST COMPANY, RECEIVER OF RATHBONE MANUFACTURING COMPANY, RESPONDENT

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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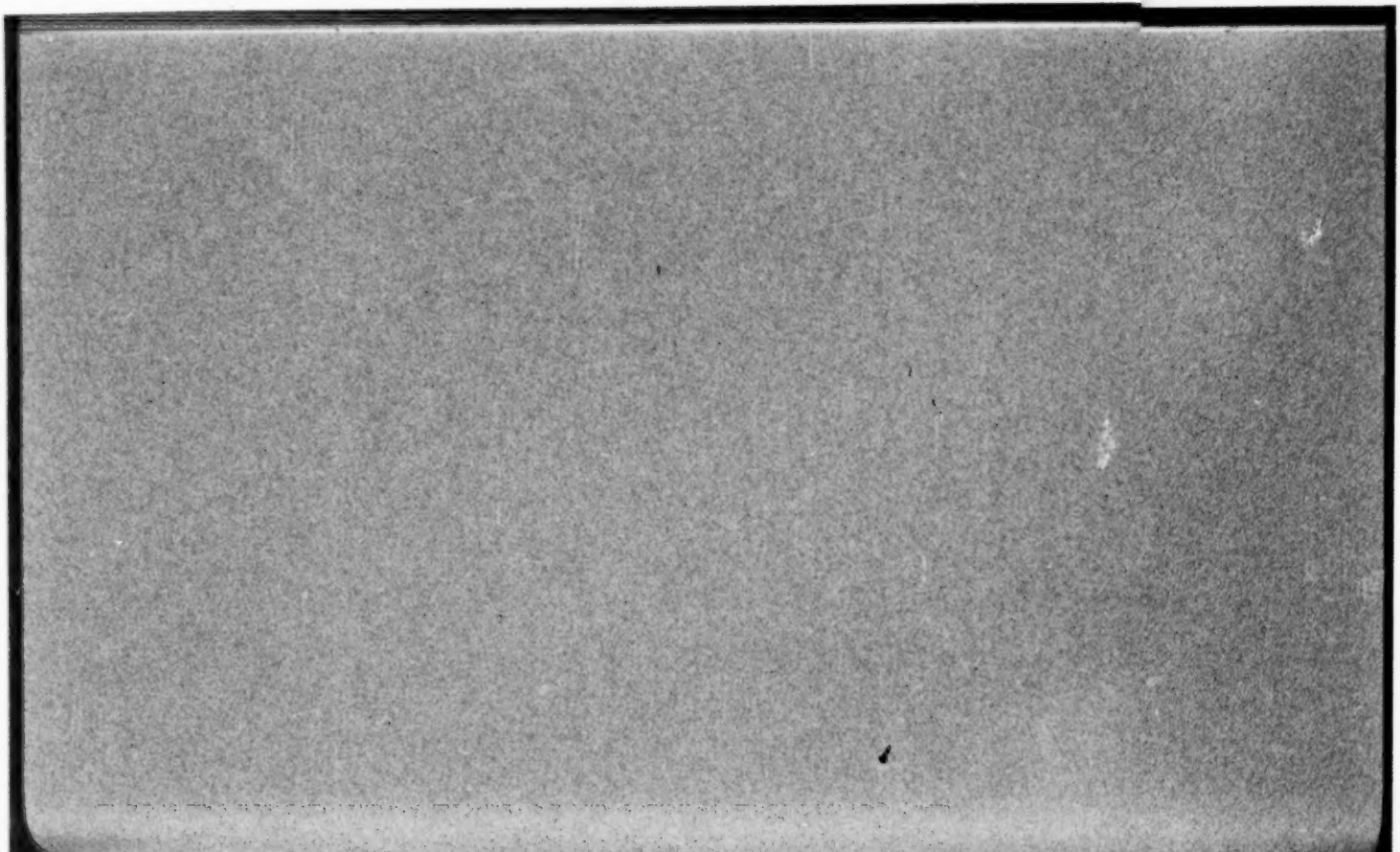

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OCTOBER TERM, 1925

No. 272

ANDREW W. MELLON, DIRECTOR GENERAL AND AGENT (substituted in place of James C. Davis), appellant-petitioner

v.

MICHIGAN TRUST COMPANY, RECEIVER OF RATHBONE Manufacturing Company, respondent

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

ARGUMENT

SUMMARY

I

If, as is conceded by appellee, the United States would be entitled to priority, its representative the Director General suing on its behalf is likewise so entitled.

II

Section 10 of the Federal Control Act (40 Stat. 451, 456) merely subjected operations of the carriers to existing laws. The Director General was

not included in the term "carriers." The Government thereby did not surrender its sovereignty in regard to the prosecution of suits.

III

The Director General is not asserting priority under the general prerogative belonging to the United States in its sovereign capacity but does so under the express language of Section 3466, U. S. Revised Statutes.

I

The claim for which priority is sought is for money due the United States

Respondent admits that under the decisions of this Court and the record in this case the Director General of Railroads would be entitled to priority, under Section 3466 of the U. S. Revised Statutes, for the debt here sued for unless barred from such right by the provisions of Section 10 of the Federal Control Act of March 21, 1918 (c. 25), 40 Stat. 451, 456.

Said Act is entitled:

> An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes.

As was said by Mr. Justice Holmes in delivering the opinion of this Court in *Davis* v. *Corona Coal Co.*, 265 U. S. 219:

> The provisions of Sec. 10 of the Federal control act, of March 21, 1918, c. 25, 40 Stat.

> 451, 456 " subjecting carriers to all laws and liabilities as common carriers whether arising under State or Federal laws or at common law, except," etc., rightly was said by the counsel for the petitioner to do no more than subject operations of the carriers to existing laws * * *. The distinction in the statute between carriers and the Government is pointed out in the above-cited case. (*E. I. DuPont De Nemours & Co.* v. *Davis*, 264 U. S. 456.)

In the Du Pont case it was held that limitation of actions by " carriers " for recovery of charges was not applicable to the Director General and that unless plainly so provided the United States did not waive any sovereign right in taking over the railroads.

In the opinion of the Court delivered by Mr. Justice Sutherland in the said case it was said (p. 462):

> In taking over and operating the railroad systems of the country, the United States did so in its sovereign capacity, as a war measure, "under a right in the nature of eminent domain" (authorities cited), and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during Federal control, as we have seen, are the property of the United States. Section 12, 40 Stat. 457. An action by the Director General to recover upon a liability arising out of such

control is an action on behalf of the United States in its governmental capacity, *Ches. & Del. Canal Co.* v. *United States* 250 U. S. 123, 126. [Etc.]

II

By section 10 of the Federal Control Act (40 Stat. 451, 456) the United States did not surrender its sovereignty in regard to the prosecution of suits for causes of action arising out of the Federal control of railroads

By Section 10 of the Federal Control Act, quoted and relied on by respondent, the Government consented to suits against it concerning matters growing out of its operation of the railroads. In other words, the Government consented to be subject, in the operation of such railroads, to the same liabilities as the owners would have been subject if operating their own properties but in so doing the Government did not surrender its sovereignty in other respects. Merely consenting to be sued and to be liable in certain cases will be strictly construed and will not be extended beyond the fair construction of the language used in announcing such surrender of sovereignty. The consent of the Government to assume certain liabilities while operating the railroads and consenting to be sued for the enforcement of such liabilities can not be construed as a surrender of its sovereignty in connection with the bringing or prosecution of suits.

The claim sued on in the case at bar is for moneys earned by the Government while operating

the railroads in its sovereign capacity and the suit is by it through the Director General in the same capacity. There is nothing in the Federal Control Act or in the Transportation Act of 1920 (41 Stat. 456) indicating any surrender of the sovereignty of the Government concerning the bringing or prosecution of suits for the conservation or protection of the Government assets. The fact that the Government during Federal operation and for a limited time thereafter subjected itself to the liabilities of a carrier can not affect the right of the Government to sue for the collection of moneys accruing while it was operating the railroads, said moneys being expressly declared to be the property of the Government, nor deprive the Government of priority granted in the distribution of the assets of an insolvent concern as provided in Section 3466.

The decisions referred to by respondent holding that under the present Bankruptcy Act the Government is not entitled to priority except for taxes are based on the ground that such statute excluded other debts due the Government and hence priority claimed was not given it by law.

III

The assertion of priority is by virtue of section 3466 U. S. Revised Statutes

As we understand respondents' argument they erroneously assume that in the case at bar the Director General is attempting to assert priority under the general prerogative belonging to the

United States in its sovereign capacity, whereas the fact is that the priority here sought is expressly averred to be by virtue of Section 3466, U. S. Revised Statutes, which provides:

> Wherever any person indebted to the United States is insolvent, * * * the debts due to the United States shall first be satisfied [etc.].

Insolvency is admitted and we have attempted to show that the indebtedness sued for is due the United States and that a suit for such indebtedness by the Director General is a suit on behalf of the United States; the conditions required being satisfied, priority is established.

The other cases cited merely hold that by Section 10 of the Federal Control Act the United States had waived its immunity to suits for liabilities growing out of the operation of the railroads to the same extent as though it were a railway corporation operating as a common carrier. By submitting itself to be sued, however, the Government did not surrender its right or power to sue or any right incident thereto.

Respectfully submitted.

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